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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

NO. 75-1690

T. M. "JIM" PARHAM, et al.,

Appellants,

-vs-

J. L. and J. R., et al.,

Appellees.

Appeal From The Judgment Of The United States District Court For The Middle District of Georgia

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BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE[1/]

For over fifty years, the Child Welfare League of America has been an

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1/ A joint letter from counsel for both appellants and appellees, granting permission for Amicus to file this brief, has been filed with the Clerk of the Court.

advocate for children, devoting its efforts to the improvement of care and services for deprived, neglected and dependent children. The League is a non-sectarian federation of almost 400 child welfare agencies in the United States and Canada. It provides leadership and services to the child welfare field, and serves as a national clearinghouse and forum for exchange of knowledge and experience. It acts as a coordinator, a catalyst, and an advocate.

Almost all League affiliates provide direct services for children, services that reinforce the ability of parents to meet the child's needs, services that supplement the care which the child receives from parents, and services that substitute for parental care when necessary. Among the many services provided by affiliates are services for children in their own homes, protective services, shelter care, day care, homemaker services, foster family care, group home care, institutional care, residential treatment for emotionally disturbed children, adoption services, day treatment,

maternity homes and services for unmarried parents. In addition, the League itself conducts research, provides consultation to agencies and communities, provides information for public education, organizes annual regional conferences, and publishes a monthly journal, Child Welfare, a quarterly CWLA Newsletter, and numerous pamphlets and leaflets.

Amicus thus combines extensive experience in children's mental health treatment programs with a longstanding concern for promoting opportunities which will contribute to the health and well-being of children. Amicus has reviewed the arguments presented below by the parties and Amici, as well as by appellants herein; Amicus believes that it will bring to this case considerations, information, and a perspective which will be of assistance to this Court in passing upon the significant issues raised by this appeal.

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires

that children be afforded judicial hearings before they may be committed to state mental hospitals by their parents or guardians?

2. Since the Georgia legislature has determined that children fourteen years of age or older possess sufficient maturity and understanding to be entrusted with a number of significant rights and responsibilities, are these children entitled to the same pre-commitment hearings as adults under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

SUMMARY OF ARGUMENT

Incarceration in a state mental hospital constitutes a severe deprivation of a minor's liberty, as well as a number of other constitutionally protected rights, including the minor's right to privacy and freedom of association. Presumptively, deprivation of these rights must be safeguarded by some type of due process hearing. Hearings are not required only in those limited circumstances where: (a) there is no significant risk of erroneous

deprivation of the protected interest; (b) there are adequate, substitute procedural safeguards; or (c) the fiscal or administrative burdens caused by the due process requirements would be unduly onerous.

None of these limited exceptions apply in this case. Since psychiatrists are unable to agree even in their most gross psychiatric diagnoses, judicial hearings are required to safeguard the minor's liberty. These hearings are also necessary because Georgia law does not even require the hospital to find that a minor suffers from a mental illness before accepting him for treatment; and because of the well-documented bias of psychiatrists in favor of committing healthy persons to mental hospitals, rather than risking the error of allowing mentally disordered persons to go free. Given the time and resource constraints which frequently make comprehensive psychiatric evaluations impracticable, psychiatrists tend to support the parent who has already concluded that his child requires hospitalization.

Unfortunately, the parent s judgment

is frequently suspect. In placing their children in mental hospitals, many parents are responding to familial difficulties to which the parents themselves may be contributing and in which they are, in any event, participants. Under such circumstances even the best-intentioned parent may find it difficult to make a rational decision about how to cope with intra-family strife. The potential, and frequently actual, conflict of interest between a child and his parents in such times of stress has caused a number of courts to hold that the distinct interests of the child in cases such as this can only be safeguarded in a judicial hearing at which the child is represented by independent counsel.

Unlike many jurisdictions, Georgia does not require that the minors be screened and evaluated by community mental health centers before they may be placed in state mental hospitals. Hence, no argument can be maintained that a substitute procedure sufficient to satisfy due process exists. Although the fiscal and administrative burdens caused by pre-commitment hearings will

not be inconsiderable, they are far less onerous than burdens imposed by this Court previously in implementing the due process guarantee.

The record in this case demonstrates what is confirmed by numerous studies: many children placed in state mental hospitals could just as easily have been committed to state training schools because they have committed delinquent acts or status offenses which fall within the jurisdiction of the juvenile court. Because of the considerable overlap between the populations of state training schools and mental hospitals, and the arbitrariness of the process by which it is determined that minors will be channelled into one system rather than the other, In re Gault cannot be distinguished on the basis that it relates solely to quasi-criminal conduct. Like Gerald Gault, appellees are being subjected to massive deprivations of numerous constitutional rights upon the pretense of providing them with meaningful treatment. Unfortunately, many minors confined in mental institutions are at best exposed to protective custody; at worst they

live under brutalizing and inhumane conditions. Hence, absent some constitutionally adequate justification for treating appellees here differently from children in juvenile courts, appellees must receive the same due process protections mandated by Gault.

Legislative distinctions between children and adults generally rest upon the assumption that minors lack the maturity and judgment necessary for reaching reasoned decisions. Georgia, however, has determined, in a variety of contexts, that children fourteen years of age or older are sufficiently mature to be entrusted with extensive rights and responsibilities. In Georgia thirteen is the age of criminal responsibility and at age fourteen minors may admit themselves to state mental hospitals -- although this power is subject to the parent's later right of disaffirmance. Having determined that age fourteen is the dividing line between mature and immature minors, Georgia's denial of hearings to minors fourteen years of age and older serves no significant, or even rational, state interest. Hence, even if, arguendo,

this Court rejects Amicus' due process argument, appellants' statutory scheme must be invalidated under the Equal Protection Clause as it applies to minors over the age of thirteen.

ARGUMENT

I. INCARCERATION IN A STATE MENTAL INSTITUTION CONSTITUTES A SEVERE DEPRIVATION OF A MINOR'S LIBERTY AND IMPLICATES A NUMBER OF THE MINOR'S OTHER CONSTITUTIONALLY PROTECTED RIGHTS.

A. Children are Protected in Their Liberty by the Due Process Clause of the Fourteenth Amendment.

It is by now well-established that children fall within the ambit of the Due Process Clause of the Fourteenth Amendment. Ingraham v. Wright, 51 L.Ed. 2d 711, 731 (1977); Goss v. Lopez, 419 U.S. 565 (1975); In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966). As this Court observed in its landmark decision of In re Gault, supra, the word "person" in the Due Process Clause is not limited to adults, for "neither the Fourteenth Amendment nor the Bill or Rights is for adults alone." 387 U.S. at 13.

The due process protections of the Fourteenth Amendment have been extended to children both in what might be considered quasi-criminal proceedings, e.g., In re Gault, supra; Kent v. United States, supra, as well as in clearly non-criminal circumstances, e.g., Goss v. Lopez, supra. In Goss v. Lopez this Court specifically required that due process be provided to protect children's non-de minimis interests by holding that the state could not deprive a child of his statutorily derived right to attend school for even a few days without providing the child with notice and an opportunity to be heard. Hence, the applicability of the procedural safeguards of the Due Process Clause to the present case, where the threatened injury clearly exceeds the injury of a brief school suspension as in Goss v. Lopez, supra, should be readily apparent.

B. Several Bill of Rights Safeguards Are Implicated by Confinement of a Minor in a State Mental Institution.

Assuring the protection of due process rights in the present case is especially appropriate because commit-

ment to a mental institution is a "massive curtailment of liberty" for children as well as for adults. See Humphrey v. Cady, 405 U.S. 504, 509 (1972); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968). Moreover, "liberty" is an "interest of transcending value," which affects numerous other constitutional interests of extreme importance. Speiser v. Randall, 357 U.S. 513, 525 (1958). Most obvious, perhaps, is the deprivation of the "right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, 364 U.S. 479, 486 (1960). "It is beyond debate that freedom to engage in association for advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). See De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

Commitment to a mental institution also substantially affects the "right

to privacy" of children, a right which this court has sometimes referred to as the "right to be let alone." Stanley v. Georgia, 394 U.S. 557, 564 (1969). In recent years this Court has squarely held that this constitutional safeguard is applicable to children, as well as adults, protecting them against absolute or arbitrary prohibitions upon their decisions to prevent or terminate pregnancies. Carey v. Population Services International, 97 S.Ct. 2010 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). Also implicated are the minor's rights not to have his bodily integrity invaded by enforced administration of psychotropic medication,[2/] and his

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2/ Cf. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971), cert. denied, 404 U.S. 980 (1971). The record herein reveals that plaintiff J. L. was treated by appellants with various drugs, including ritalin, amphetamine sulfate, navane, and numerous tranquilizers, but there was no consistent improvement in his condition (App. 96). In the 1973 Report of the Study Commission on Mental Health Services for Children and Youth, cited extensively by the district court below, the Commission found: "A high percentage of patients are on medication . . . . (footnote continued on next page)

reputation injured by being stigmatized as mentally ill.[3/]

2/ (continued from previous page)
It is not clear whether [medication is] . . . being used to implement individual treatment plans or to manage inappropriate behavior. Id. at 9.

3/ Cf. Goss v. Lopez, 419 U.S. 565 (1975). This interest in not being stigmatized is, in Amicus' view, especially signficant in light of the incontrovertible evidence that: "[t]he suspicion and mistrust that have surrounded mental illness since the time treatment first began by exorcising demons will haunt and hinder the expatient when he returns to society." Note, Civil Commitment of the Mentally Ill, 14 U.C.L.A. L.Rev. 822, 831 (1967). Besides the social ostracism involved, stigma from a mental commitment has a ". . . devastating effect on [the ex-patient's] employability." Calif. Assembly Subcomm. on Mental Health Services, The Dilemma of Mental Commitments in California, 57-9 (1972). Hence, the mental patient's interests which are affected by his commitment to a state hospital may even transcend the deprivations he suffers while confined. As one court has remarked, "the very livelihood of the individual may be at stake." In re Ballay, 482 F.2d 648, 668 (D.C. Cir. 1973).

II. THE INTERESTS WHICH THE STATE OF GEORGIA AND GEORGIA PARENTS SEEK TO VINDICATE DO NOT JUSTIFY MASSIVE CURTAILMENT OF APPELLEES' LIBERTY AND OTHER CONSTITUTIONALLY PROTECTED RIGHTS IN THE ABSENCE OF A JUDICIAL DETERMINATION THAT SUCH INTERVENTION IS APPROPRIATE AND NECESSARY.

As Amicus has demonstrated in Point I, supra, enforced confinement in a state mental institution constitutes a severe and pervasive infringement upon interests and values dearly cherished under our constitutional scheme. According to the due process analysis which has been adopted by this Court, interests which cannot be characterized as de minimus presumptively must be safeguarded by some type of prior due process hearing. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (ten days of education); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Fuentes v. Shevin, 407 U.S. 67 (1972) (property attachment); Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits). These hearings are not required only in those limited

circumstances where: (a) there is no significant risk of erroneous deprivation of the protected interest; (b) there are adequate substitute procedural safeguards; or (c) the fiscal or administrative burdens caused by the due process requirements would be unduly onerous. Mathews v. Eldridge, 424 U.S. 319 (1976). See, Smith v. Organ. of Foster Families for Equality and Reform, ___ U.S. ___, 97 S. Ct. 2094 (1977).

As Amicus will demonstrate, infra, none of these exceptions apply in the present case. Without the protections afforded by an adversarial hearing, a serious risk exists, as the court below found, that children will be erroneously or inappropriately placed in state mental hospitals. 412 F.Supp. at 137-38. In Amicus' view, only through a judicial hearing procedure can the debilitating consequences of such inappropriate commitments be avoided. Hearings will facilitate the placements of minors who do not require hospitalization in non-institutional settings; and such procedures will maintain the fairness of the

process which, as this Court has remarked in a related context, may be as vital to the success of the treatment program as the treatment procedures themselves. In re Gault, 387 U.S. 1, 26 (1967).

As Amicus will also show, infra, there are no adequate, substitute procedures under Georgia law to safeguard the liberty and related interests of minors placed in state mental hospitals. There is no Georgia statute or regulation which requires referral of minors to a community mental health center for evaluation and diagnosis, and the state hospitals themselves are ill-equipped to expeditiously or accurately "screen out" those minors who do not require hospitalization. Finally, the fiscal and administrative burdens caused by these hearings, although not inconsiderable, will be far less onerous than burdens previously imposed by this Court in implementing the due process guarantee. See, e.g., Goldberg v. Kelly, supra; In re Gault, supra.

In Amicus' view the due process issue before this Court turns primarily

upon the balancing of interests asserted by the various parties implicated in the decision to place a child in a state hospital. These are the State, the child, and the child's parents or guardians. The child's interest in liberty, privacy, and freedom of association have already been discussed in Point I, supra. The State's interest is summarized by the Latin phrase parens patriae -- assuring the mental health of Georgia children. The parents also share this interest with regard to their own children; additionally, they have an interest in preserving the family unit and maintaining parental authority. See Bartley v. Kremens, 402 F.Supp. 1039, 1048 (E.D. Pa. 1975), vacated as moot, 97 S.Ct. 1709 (1977). Amicus will now discuss the interests of the State and the child's parents or guardians and demonstrate that none of these interests justify the abrogation of due process safeguards in the present case.[4/]

4/ It is also of some significance that these identical interests have been rejected, either explicitly or
(footnote continued on next page)

A. Assuring the Mental Health of Children.

1. At Common Law the Parens Patriae Authority of the Sovereign Was Not Exercised to Institutionalize the Mentally Ill.

One of the state interests which, allegedly, is being promoted by the Georgia voluntary commitment statutes[5] is the promotion and protection of the mental health of Georgia children. At common law the power of the King to act as guardian to promote the welfare of persons under legal disabilities was described by the term

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4/ (continued)
implicitly, as justifications for denying minors procedural rights in every reported decision examining the applicability of the Due Process Clause to the placement of minors in state mental institutions. In addition to the present case are: Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Bartley v. Kremens, supra; Kidd v. Schmidt, 399 F.Supp. 301 (E.D. Wis. 1975) (three-judge court); Saville v. Treadway, 404 F.Supp. 430 (M.D. Tenn. 1974) (three-judge court); In re Roger S., 19 C.3d 655, ___ Cal.Rptr. ___ (1977); In re Long, 25 N.C. App. 702, 214 S.E. 2d 626 (1975).

5/ Ga. Stats. Ann. §§88-503.1, 88-503.3(a).

parens patriae; in modern days this royal prerogative of the King has passed to the states. Hawaii v. Standard Oil Company, 405 U.S. 251, 257 (1972). The power of the state to intervene in the affairs of children and incompetents is usually justified on the basis that both groups are incapable of exercising mature judgment. See, Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 Stan.L.Rev. 1383, 1392 n. 52 (1974).

What is significant for present purposes is recognition that at common law parens patriae was not invoked to justify actual confinement of the mentally ill. A person found to be a lunatic was ordinarily committed to the custody of a friend who received an allowance with which to care for the unfortunate person. See 1 Blackstone, Commentaries 305 (Hammond ed. 1890). Thus, having developed at a time when public institutions for the mentally ill were virtually non-existent, the parens patriae doctrine which developed at common law cannot now be used to justify confinement of the mentally

ill in institutions such as the mental hospitals we know today. See Lessard v. Schmidt, 349 F.Supp. 1078 at 1084-86 (E.D. Wis. 1972); vacated and remanded on other grounds, 414 U.S. 473 (1974); judg. reinstated, 379 F.Supp. 1376 (E.D. Wis. 1974); vacated and remanded on other grounds, 421 U.S. 957 (1975); judg. reinstated, 413 F. Supp. 1318 (E.D. Wis. 1976). Moreover, in colonial America, parents were expected to care for their own mentally disabled offspring. S. Brakel and R. Rock, eds., The Mentally Disabled and the Law 4 (1971). Hence, at common law and during the early stages of the history of this country, the authority of the sovereign to intervene parens patriae was not used to justify the more recent American innovation of using the Latin phrase to justify total, and in some cases permanent, loss of liberty. See Lessard v. Schmidt, supra, 349 F.Supp. at 1085; N. Kittrie, The Right to be Different: Deviance and Enforced Therapy 66 (1971).

In the juvenile sphere this Court has similarly traced the background of the state's purported power to deny

minors procedural rights available to adults. This Court's conclusion with regard to the state's parens patriae authority over juveniles parallels the conclusions which have been reached with regard to the historical basis for the state's power over incompetents: "The constitutional and theoretical basis for this peculiar system is -- to say the least -- debatable." In re Gault, 387 U.S. 1, 17 (1967).

2. This Court's Analysis in In re Gault, Disposes of Appellants' Parens Patriae Argument.

In recent years this Court has consistently rejected "civil labels," "good intentions," or "parens patriae" as justifications for denying criminal due process safeguards to minors in juvenile court. Breed v. Jones, 421 U.S. 519, 530 n.12 (1975); In re Winship, 397 U.S. 358, 365-66 (1969); In re Gault, 387 U.S. 1, 18, 19 (1967). Instead, this Court has measured the need for due process procedures against what it has termed the "reality" of institutional confinement. In re Gault, supra, 387 U.S. at 26-31. In Gault, this "reality" was described by Justice Fortas as follows:

> The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence -- and of limited practical meaning -- that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or 'industrial school' for juveniles is an instituton of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a 'building with whitewashed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. Id. at 27.

The institutional surroundings; the absence of the minor's most cherished companions, compelled association with persons who have committed deviant and anti-social conduct; the pervasive deprivation of individual liberty: it is these realities which impelled this Court to require extensive due process safeguards in Gault. Even the slightest familiarity with state mental institutions elicits recognition that this Court's description of

training school life in Gault is equally applicable to state mental institutions,[6/] and therefore, that the due process protections against unwarranted or inappropriate commitments mandated by this Court in Gault are essential to safeguard the integrity of the mental hospital placement process.

The lack of adequate treatment resources in most of our state mental institutions is so widespread that in Jackson v. Indiana, 406 U.S. 715 (1972), this Court recognized that the

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6/ "Recent studies -- notably those of Drs. Erving Goffman, William Caudill, and Ivan Belknap, based on prolonged ward observation -- attest to the continuance of the stripping of the patient, loss of his individuality and dignity, depersonalization, and demoralization. The chronically acute shortage of physicians in most wards makes the term 'psychotherapy' a hideous mockery for most patients. In most public mental hospitals, the average ward patient comes into person-to-person contact with a physician about fifteen minutes every month -- not a day or a week, but a month." Testimony of Dr. Albert Deutsch Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, pt. 1, 40, 43-44, 87th Cong., 1st Sess. (1961).

rationale for most pre-trial commitments of "incompetent" criminal defendants is dubious, ". . . given the state of most of our mental institutions." Id. at 734-35. In a case before a three-judge federal district court, Pennsylvania conceded that only three percent of the inhabitants of one of its state mental hospitals received any therapeutic-psychiatric treatment whatsoever. Dixon v. Attorney Gen'l of Penna., 325 F.Supp. 966, 969 (M.D. Pa. 1971).

In Georgia the Study Commission on Mental Health Services for Children and Youth indicated in its 1973 Report that at three of the five Georgia regional hospitals the staff believed that a majority of the children did not need to be hospitalized if alternative services were available in the community. Id. at A-5. The Commission found that many children are "not receiving individual or group therapy" and that interactions between children and the nursing staff "tended to be supervisory in nature rather than intensively therapeutic." Id. at A-10-11. The Commission questioned

whether the high percentage of patients on medication and frequent use of the seclusion room were attributable to the need to ". . . implement individual treatment plans or to manage inappropriate behavior." Id. at A-9. Finally, the Commission recommended that the eighty-bed adolescent unit at Central State Hospital -- where plaintiffs J. L. and J. R. have been confined -- should be closed, concluding: "It is a physical facility completely unacceptable for therapeutic rehabilitation of young people." Id. at 31.

The snake-pit conditions of most of our mental hospitals is so widespread as to have received almost universal recognition.7/ These

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7/ "[E]ighty percent of mental institutions are purely custodial providing no treatment of any significance even to their law abiding patients. . . . A good portion of the remaining twenty percent provide adequate treatment only for well-paying private patients." Schmideberg, The Promise of Psychiatry: Hopes and Disillusionment. 57 Nw. U.L. Rev. 19, 22 (1962). In a very recent book a distinguished physician concludes with considerable dismay: ". . . the state psychiatric facilities can, at best, be described as
(footnote continued on next page)

conclusions are supported by numerous studies which have found that varying methods of in-hospital treatment of psychiatric patients have not differentially affected discharged patients' functioning in the community as measured by recidivism, post-hospital employment, or any other suitable measure of behavior.[8/] Dr. Alan Stone of the Harvard Law School, who is perhaps the leading scholar in the country on the relationship between mental health and the law, has echoed these exact sentiments with regard to in-hospital psychiatric treatment

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7/ (continued)
medieval horrors and an offense to our civilization and a blot on psychiatry." Peskze, Involuntary Treatment of the Mentally Ill 67 (1975). "State mental hospitals suffer, perhaps, from more maladies than their inhabitants." Robitscher, The Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient, 18 Vill.L.Rev. 10, 11 (1972).

8/ The applicable literature is reviewed extensively in Schwitzgabel, The Right to Effective Mental Treatment, 62 Cal.L.Rev. 936 (1974). See Anthony, Buell, Sharott, and Althoff, Efficacy of Psychiatric Rehabilitation, 78 Psychological Bulletin 447 (1972).

of children. Stone, Mental Health and Law: A System in Transition, National Institute of Mental Health (DHEW Pub. No. (ADM) 75-176, 1975).[9/]

In In re Gault, supra, this Court reiterated its concern -- expressed earlier in Kent v. United States, 383 U.S. 541, 556 (1966) -- that children charged with the commission of delinquent conduct receive, "the worst of both worlds"; they get "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." In re Gault, supra, 387 U.S. at 18 n.23. Amicus believes that the

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9/ Professor Stone attributes the lack of available effective treatment for children to the following factors: "(a) Inpatient psychiatric facilities for children with rare exception have been horrendous. (b) Whatever the value of traditional diagnostic criteria may be they are not readily applicable to children, except in the case of profound illness. (c) Psychotherapeutic methods that do exist are geared to the intact family, and that is rarely the target group of the juvenile courts. (d) Finally, as Justine Wise Polier points out, the dollar and resource cost of the medical model approach is totally unrealistic." Id. at 146.

overwhelming weight of available evidence demonstrates that minors confined to state mental institutions are similarly: (a) subject to severe and massive deprivations of liberty; (b) often confined under conditions which can only be considered debasing and dehumanizing; and (c) receiving mere custodial care, rarely benefiting from any meaningful therapeutic treatment.

It is Amicus' position that as in Gault, supra, the institutional reality which greets minors who are processed through Georgia's "voluntary admission and commitment" system must be considered by this Court in determining whether due process protections must be provided. And because at the very least, there is considerable cause to question whether the legislative promise of "treatment" will be fulfilled,[10/] Amicus believes

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10/ 28 Ga. Code Ann. §88-503.1 authorizes placement of minors in state mental hospitals by their parents or legal guardians only if the superintendent of the hospital determines there is "evidence of mental illness" and the minor is "suitable for treatment."

that rigorous due process procedures are necessary to safeguard the rights of minors who may not require institutionalization. As in Gault, supra, these due process protections are especially appropriate because the minor plaintiffs in the present case: (a) are being processed through a special system lacking the procedures available to similarly situated adults; (b) are given no choice in the decision whether to continue treatment;[11/] (c) are being confined in order forcibly to provide them with treatment; (d) may be confined indefinitely until they attain their age of majority; and (e) will be released only when a discretionary determination has been reached that they are sufficiently "cured" or "rehabilitated" to warrant their return to society.

Appellants assert that the Gault due process analysis is inappropriate to this case. They note that in Gault

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11/ Under Ga. Code Ann. §88-503.3(a), the discharge of a minor patient, who was admitted on application of his parent or guardian, may be conditioned upon the consent of the parent or guardian.

this Court confined its consideration to delinquency proceedings which are basically quasi-criminal in nature.[12/] This distinction, if given determinative weight, paints Gault with too narrow a brush. As discussed earlier, this Court in Gault was concerned with far more than the quasi-criminal aspects of delinquency proceedings. If this Court's decision had turned solely upon the quasi-criminal nature of delinquency proceedings, there would have been no reason to focus at such length upon the realities and limitations of institutional treatment. Hence, this Court has not limited the application of the Due Process Clause to criminal or quasi-criminal proceedings. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975); Stanley v. Illinois, 405 U.S. 645 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

Appellants would convince this Court that the absence here of a legitimate police power interest in quasi-criminal conduct justifies a relaxation of due process rigor. Of course,

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12/ Brief for Appellants at 31.

the converse is true. Since the Georgia voluntary commitment scheme is premised soley upon the state's interest in promoting the health of its citizens, even greater vigilance is required to assure that persons are not being improperly denied their liberty.[13/] The absence of any requirement that commitment be based on specific conduct, combined with the absence of clear-cut statutory criteria for commitment, suggests the abuses to which such a vague statute may be subject. Minors who have committed no anti-social acts, and who do not wish to be confined in state mental institutions, surely have as much right as the alleged delinquents in Gault to demonstrate that the state has not satisfied the criteria it has established for their institutionalization and treatment. As this Court stated in Minnesota v. Probate Court, 309 U.S. 270 (1940):

13/ "Experience should teach us to be most on our guard to protect liberty when the Government purposes are beneficent." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. 309 U.S. at 276-77.

Finally, the record in the present case reveals that a large number of minors admitted to Georgia state mental hospitals had committed delinquent or status offender conduct for which petitions could have been filed under the Georgia juvenile court law.[14/] The deposition of Dr. Luciano L'Abate, introduced at trial, noted the "tremendous overlap" in the types of behavior which result in minors being labelled mentally delinquent or

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14/ See, e.g., #832-00-1063 (runaway); #831-00-2543 (runaway); #831-00-3203 (car theft); #251-57-2450 (runaway); #834-00-0227 (chronic truancy); # D_____ (marijuana smoking); #800-209-308 (runaway). (App. 894-97).

mentally ill. App. 811. This is consistent with the finding in numerous case decisions that many children in state training schools would have been likely candidates for placement in mental hospitals, just as there are children in mental hospitals who might equally have been the subjects of juvenile court proceedings. See, Morales v. Turman, 383 F.Supp. 53, 88-89 (E.D. Tex. 1974), rev. 535 F.2d 864 (5th Cir. 1976), rev. and remanded 97 S.Ct. 1189 (1977) (372 juveniles in state training schools emotionally disturbed and 209 juveniles in these institutions had I.Q.'s lower than 70); Martarella v. Kelly, 349 F.Supp. 575, 591 (S.D.N.Y. 1972); Lollis v. New York State Dept. of Social Services, 322 F.Supp. 473 (S.D.N.Y. 1970). As one commentator has aptly noted,

> . . .[S]tandards of deviance and acceptability are relative. . . . The same behavior may, depending upon the situation, be considered socially acceptable, mentally ill, or criminal. . . .
>
> For example, an adolescent who commits a car theft may confess to a policeman, be called a juvenile delinquent and be jailed.

> He may instead consult a psychiatrist and then he is likely to be labelled mentally ill and receive psychotherapy. . . .
> J. Zusman, "Society and Mental Illness," 15 Arch. Gen. Psychiatry 635, 636-37 (1966).

Since the decision whether to commit a juvenile to a training school or place him in a State mental hospital will frequently depend -- not on the minor's behavior -- but rather on whether the minor is processed through the juvenile court or mental health systems -- Gault cannot be distinguished on the basis that it relates solely to quasi-criminal conduct. Georgia can no more readily fail to vouchsafe due process than could Arizona have circumvented Gault by legislating that parents could place their children directly in state training schools without the filing of juvenile court petitions. See Jackson v. Indiana, 406 U.S. 715 (1972) (state may not, consistent with Equal Protection Clause, create alternative procedures to accomplish same result, one of which lacks procedural safeguards afforded by the other); see also Baxstrom v. Herold, 383 U.S. 107 (1966).

B. Preserving the Family and Maintaining Parental Authority.

The principal interests which appellants assert in support of Georgia's voluntary commitment scheme are the preservation of the family unit and, especially, the maintenance of parental authority.[15/] Appellants note that the decision to provide a child

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15/ In the case of named plaintiff J. R., it is questionable whether appellants may assert these purported interests of his parents or guardians in support of the placement statute. J. R. was admitted to Central State Hospital upon application of the Georgia Department of Family and Children's Services with whom he had been placed by the juvenile court. 412 F.Supp. at 116. As this Court recently noted in Smith v. Organization of Foster Families, 45 U.S.L.W. 4638 (June 13, 1977), "[a]lthough the agency usually obtains custody in foster family care, the child still legally 'belongs' to the parent, and the parent retains guardianship." N.20 at 4641. "[F]or some crucial aspects of the child's life," "the agency has no authority to act." Ibid. In the case of J.R. the agency did possess the authority to seek his admission to Central State Hospital, but it did not thereby gain the right to assert the interests of plaintiff's parents or guardians as justification for denying him independent due process rights.

with medical care has traditionally been considered the prerogative of the child's parents. Appellants equate long-term institutionalization of a child in a mental hospital with, for example, forcing a child to share his room with siblings; and they conclude that both procedures should be treated by the law in a similar fashion. In support of their contention that the state may intervene in the affairs of the family only in the most limited circumstances, appellants cite Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

At common law children were treated generally as the property of their parents -- exercising few independent rights. A parent was considered the general guardian of the child's person even though the parent could not -- except in limited, well-defined circumstances -- dispose of the child's property. See Hoyt v. Hammekin, 55 U.S. 346 (1852); Maryland Casualty Co. v. Lawson, 110 F.2d 269 (5th Cir. 1940). It is sobering to recall that

only one hundred and three years ago the American Society for Prevention of Cruelty to Animals was empowered by the courts to act in a case of cruelty to a child on the basis that a child is an animal. Mitchell, The Child and Experimental Medicine, 1 Brit. Med. J. 721, 722 (1964).

In recent years, however, courts have increasingly recognized the constitutional rights of children. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967). Although these cases do not involve a direct conflict between the rights of children and the authority of their parents, these decisions treated children as independent entities exercising rights derived -- not from their parents -- but rather from their status as persons under the Consitution. In Gault, for example, this Court rejected the juvenile court rationale that a parent may be relied upon to protect the interests of the child. In re Gault, supra, 387 U.S. at 35.

Prior to its decision in Planned

Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), this Court had never decided a case squarely presenting a direct conflict between children's rights and parental authority. Hence, the prior decisions of this Court which are relied upon by appellants are inapposite because each involved solely a conflict between the power of the state and the authority of the parent. Referring to this line of authority, one court has correctly noted:

> . . . those cases which have considered parental control of children have involved conflicts between parents and the state wherein the courts have considered intrusions by the state into the area of parental values -- particularly religious values. Cases which have upheld parental control have not involved a situation where the parent and child differ and the state is imposing the parents' views on the minor. Foe v. Vanderhoof, 389 F.Supp. 947, 956 (D. Col. 1975). 16/

16/ In Foe v. Vanderhoof, supra, the court was referring in its decision specifically to Pierce v. Society of Sisters, Meyer v. Nebraska, and Prince v. Massachusetts, supra. Although not referred to explicitly, the (footnote continued on next page)

Although the conflict of interest between parent and child was not raised explicitly in any of these prior cases, it is certainly possible to read each of the decisions as vindicating not only the authority of the parent, but additionally, the rights of the child. Hence, Meyer v. Nebraska, 262 U.S. 390 (1923), had at least the practical effect of enhancing the opportunities for minors who had not graduated from the eighth grade to study modern foreign languages. Pierce v. Society of Sisters, 268 U.S. 510 (1925), of course, vindicated a parent's right to send her children to private school; but this Court also made it quite clear that it was protecting as well the right of children not to be forced to receive a "standardized" education. Id. at

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16/ (cont.)
district court's comment also applies to Wisconsin v. Yoder, supra, where this Court qualified its holding by stating: "Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding." 406 U.S. at 231.

535. In Wisconsin v. Yoder, 406 U.S. 205 (1972), this Court assumed, without deciding, that both Amish children and their parents preferred that the children receive a non-public education. And in Prince v. Massachusetts, 321 U.S. 158 (1944), this Court emphasized that society's concern for the welfare of its children

> . . . is no mere corporate concern of official authority. It is the interest of youth itself. 321 U.S. at 165.

Hence, although these decisions did not expressly resolve conflicts between children's rights and parental authority, this Court did recognize that the child's welfare is an independent interest warranting solicitude and protection.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), this Court, for the first time, balanced the constitutional rights of children against the competing interests of their parents. This Court held that whatever interests a parent may have in the termination of his minor daughter's pregnancy were not more worthy of constitutional protection

than the minor's right to privacy. Accordingly, this Court invalidated the Missouri statute which had conditioned the minor's right to an abortion upon parental consent.

Planned Parenthood, supra, is instructive in several significant ways. First, this Court recognized explicitly that minors possess constitutional rights independent of their parents, and that these rights are entitled to be safeguarded even against competing claims by the minors' parents. In the present case, these rights include, not only privacy, but also the right of the minor not to be denied liberty without due process of law -- the constitutional safeguard which above all others distinguishes our system of orderly justice. See Grannis v. Ordean, 234 U.S. 385 (1914).

Second, in Planned Parenthood, this Court rejected the Attorney General's argument that requiring parental consent would be likely to further the state's interest in promoting family unity. 96 S.Ct. at 2844. Likewise, it must be seriously doubted whether vesting authority in parents

to place their children in mental hospitals without a judicial hearing is likely to promote family unity or harmony. The child who has no role in the commitment decision, is, as this Court has elsewhere recognized, unlikely to have confidence in the person or the system which refuses to accord him legitimate participation in decisions vitally affecting his interests. See, e.g., Breed v. Jones, 421 U.S. 519 (1975).

Third, this Court held that the constitutional deficiency in the Missouri statute rested in its imposition of an absolute limitation on the minor's right to obtain an abortion. As explained by Justice Stewart in his concurring opinion, the statute failed to provide for "prompt" judicial resolution of disagreements between parents and minors. It also failed to provide for judicial determinations as to the minor's ability to give informed consent without parental concurrence, or as to whether abortion would, in any event, be in the minor's best interests. 96 S.Ct. at 2850-51.

The Georgia statute under challenge in the present case suffers from similar deficiencies. It creates an absolute limitation on the minor's right not to be forcibly placed in a mental hospital. Under Ga. Stat. Ann. §88-503.1, the minor's wishes, maturity, and best interests are immaterial to the parent's placement decision.[17/]

Finally, it is essential to recognize that the dissenting opinions in Planned Parenthood, supra, rested upon a factual foundation inapplicable in the present case. In dissent, both Justices White and Stevens stressed the important function of parental counselling in ensuring that the

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17/ Bellotti v. Baird, 428 U.S. 192 (1976), which is relied upon by appellants, is simply inapposite to the case at bench. In Bellotti, supra, this Court did suggest that the Massachusetts abortion statute might be construed to obviate the constitutional problem presented by giving a parent a blanket veto over the child's decision to undergo an abortion. In the present case, by contrast, appellants are arguing that a blanket veto power identical in scope to the parental authority condemned in Planned Parenthood, supra, does pass constitutional muster.

minor's decision to terminate her pregnancy would be reasoned and well-considered. 96 S.Ct. at 2853 (separate opinion of White, J.); 96 S.Ct. at 2856-57 (separate opinion of Stevens, J.). The vital signficance of the parent's role as counselor was supported by evidence in Planned Parenthood, supra,[18] as well as in Bellotti v. Baird, 428 U.S. 132 (1976), that physicians and other persons who work at abortion clinics are unable to adequately perform this counselling function.

No similar state purpose is promoted by the Georgia scheme. First, it is questionable whether vesting commitment powers in persons other than the child, without recognizing the child's right to participate in the placement decision, would be likely to promote interchange between parent and child. Unlike the decision to terminate pregnancy, which is normally made at least initially by the minor, the decision to place a minor in a mental

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18/ 96 S.Ct. at 2851, n. 2 (Stewart, J. concurring).

hospital can, and under Georgia law frequently would, be made by a parent without prior consultation with his child. The purported mental illness of the minor would also be likely to discourage a parent from seeking the child's concurrence in the parent's commitment decision.

Second, assuming that some form of counselling would be desirable, a parent is not necessarily the appropriate person to perform that function. As more fully discussed in Part II B 3 and 4, infra, many parents are too intensely involved, either in a conflict of interest, or in the family's emotional difficulties, to serve as dispassionate advisors to their children. To the extent that the child's emotional problems are representative of broader familial dysfunction, the inappropriateness of the parent serving as counselor is self-evident.

Third, under the decision of the court below, the minor would have available to him an attorney;[19]

19/ Although the court below did not explicate the precise contours of a
(footnote continued on next page)

counsel could advise him as to both the legality and appropriateness of treatment in a mental hospital. This is a traditional role performed by the mental health bar, and would do much to ensure that the minor's decision to concur in, or to oppose, a placement in a mental hospital would be based upon the advice of a mature and neutral adult.

Finally, this Court recently decided Carey v. Population Services International, 97 S.Ct. 2010 (1977). Although Carey involved the State's, and not the parent's, power to prohibit distribution of contraceptives to anyone under sixteen years of age, this Court indicated that the two issues are analytically identical:

> Since the State may not impose a blanket prohibition or even a blanket requirement of parental consent [emphasis supplied], on

19/ (cont.)
due process hearing, other courts have assumed that provision of counsel is essential to ensure that the minor's right to be heard will be "meaningful." See, Bartley v. Kremens, supra, at 1050-51; In re Roger S., 19 C.3d 655, 672, ___ Cal. Rptr. ___ (1977).

> the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori [Emphasis in original.] foreclosed.
> 97 S.Ct. at 2021.20/

Seven justices of this Court21/ held, albeit on different theories, that the absolute prohibition upon minors under the age of sixteen obtaining contraceptives impermissibly infringed such minors' right to privacy. Carey is thus the logical extension of Planned Parenthood. Where a minor's constitutional rights are implicated, as in the present case, neither the State nor the minor's parents or guardians may impose absolute or arbitrary prohibitions or conditions upon their exercise.

Amicus does not question the general

20/ Four justice of this Court [Brennan, Stewart, Marshall and Blackman] held that where the State is impinging upon a constitutional right of the minor, it must establish that such restrictions serve a significant state interest. Id. at 2021.

21/ Justices Burger and Rehnquist dissented.

authority of parents as the persons best suited and primarily responsible for the rearing of their children. Indeed, parental authority, while not absolute (Prince v. Massachusetts, supra), is the cornerstone of our family structure. However, increasing recognition that children also have rights under our Constitution, even when those rights conflict with competing rights of their parents, as in Planned Parenthood, supra, requires a searching and sensitive examination of the interests and considerations pertinent to all parties.

Amicus believes that there are a number of significant, concrete factors which must be considered in determining when parental authority should be subject to judicial scrutiny. These include: (a) the nature and severity of the deprivation of the child's interests, and whether these interests are subject to constitutional protection; (b) the potential for harm to the child; (c) whether the parents' decision has the effect of preserving, or disrupting, the family structure; (d) the potential for conflict of

interest between parent and child; (e) the legitimacy in each situation of the normal presumption that a parent will act in his child's best interests; (f) the existence of non-judicial alternatives to safeguard the interests of the child; and (g) the child's capacity to make a competent and reasoned determination as to what is in his own best interest. When these factors are closely scrutinized, the necessity for judicial review of the parent's decision to seek commitment of his child is evident.

1. Minors Who are Inappropriately Confined in Mental Hospitals Are Subject to Severe Emotional and Psychic Harm.

As previously discussed,[22/] the decision to confine a child in a state mental hospital implicates a number of the child's constitutionally protected rights. Children who are inappropriately confined in mental institutions are especially subject to severe emotional and psychic harm. See Mathews v. Hardy, 420 F.2d 607, 611

22/ Part I, supra

(D.C. Cir.), cert. denied, 397 U.S. 1010 (1970); cf. In re Ballay, 482 F.2d 648, 667 (D.C. Cir. 1973). Providing judicial review of commitments would serve to ensure that only those minors who require hospital treatment will be institutionalized.

2. The Decision to Commit a Child to a State Hospital Necessarily Constitutes a Disruption of Family Harmony.

When a parent seeks to place his child outside of the family structure, he cedes some of his normal privilege to be free from state scrutiny. The state's ordinary reluctance to intervene in family affairs reflects an appreciation for the virtues in family autonomy. But when a parent removes a child from his family, and places him in a state institution, the sacrosanctity of family autonomy has already been breached by parental decision. There is no more reason to avoid judicial review of such a decision than there is of a parent's determination to place his child in a state training school, a local detention facility, or a juvenile camp. See In re Gault, supra; In re Roger S., supra, at 665.

Moreover, Amicus believes there is a qualitative difference between a parent's decision to seek medical treatment for his child, and his determination to commit his child to a mental institution. Medical care does not necessarily require hospitalization; but even if hospitalization is deemed necessary, institutionalization is ancillary to treatment. Mental commitments, on the other hand, are by definition custodial confinements. By their very nature such commitments are of indefinite duration and, frequently, are extensive in length. Given the absence of adequate treatment resources in many state hospitals,[23/] the custodial confinement may itself become the treatment. See Braginsky, Braginsky & Ring, Methods of Madness: The Mental Hospital as a Last Resort 179-80 (1969). And, to quote Justice Frankfurter, as a result of ". . . the uncertainty of diagnosis in this field and the tentativeness of the professional judgment." [Greenwood v. United States, 350 U.S. 366, 375

23/ See pp. 23-27, supra.

(1956)], the psychiatrist's decision as to when a patient should be released from a mental hospital would appear far less subject to a set of commonly accepted medical norms than, for example, the decision as to when a hospital shall discharge a patient following a hernia operation. Finally, as previously noted,[24/] the stigma of having been found "mentally disordered" transcends any opprobrium which might attach to hospitalization for non-therapeutic, medical reasons.

Notwithstanding these differences between treatment in medical hospitals and mental institutions, many courts have circumscribed the parent's right to make medical decisions for his child when the potential consequences to the child are sufficiently grave and/or there is reason to believe that the interests of the child are not being fully considered by the parent. Hence, it is now commonly accepted that where it is necessary to save the child's life, a court may authorize blood transfusions for a child, even

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24/ Note 3, supra.

over the First Amendment objections of parents who are Jehovah's Witnesses. See, e.g., State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962); People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (Schaefer, J.), cert. denied, 344 U.S. 824 (1952). Courts will intervene in behalf of children even where there is no threat to the life of the child. In re Sampson, 29 N.Y. 2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972).[25/] And although the Supreme Court of Pennsylvania has ruled that the state does not have a sufficient interest to overrule a parent's religious objection to surgery when the child's life is not immediately imperiled, the court refused to uphold the parent's authority as against the wishes of their sixteen-year-old son. Instead, the court remanded for consideration of the boy's

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25/ Although in deciding In re Sampson, the New York Court of Appeals sought to distinguish its prior decision in In re Seiferth, 309 N.Y. 80, 127 N.E. 2d 820 (1955), relied upon by appellants, we submit that the effect of In re Sampson, concurred in by Chief Judge Fuld who had dissented in Seiferth, was to overrule the court's earlier case.

desires. In re Green, 448 Pa. 338, 292 A.2d 387 (1972).

3. The Ordinary Presumption That Parents Are Acting in Their Child's Best Interests Is Often Questionable When Parents Seek to Transfer the Responsibility of Caring for Their Children to the State.

Most medical decisions concerning children are appropriately left to the discretion of parents; but as we have observed, courts are not unwilling to intervene where the consequences to the child appear sufficiently grave -- especially when there is reason to believe that the child's wishes and interests, as distinguished from his parents', are not receiving ample consideration. Perhaps no other decision concerning the health of children warrants independent scrutiny as clearly as the decision to commit a child to a mental institution.

Where familial dysfunction occurs, it makes little sense to vest commitment power in one of the family members -- even a parent. Numerous studies and articles report that problem behavior in children is often symptomatic of ineffectual interpersonal relationships

among family members.[26] A response of some parents to severe family stress is to scapegoat their children, in some instances even institutionalizing them so that the parents will not have to deal directly with these problems.[27]

26/ See, e.g., Spiegel, The Resolution of Role Conflict Within the Family, in A Modern Introduction to the Family, 361-81 (N. Bell & E. Vogel eds. 1960); Vogel & Bell, The Emotionally Disturbed Child as the Family Scapegoat, in A Modern Introduction to the Family, supra, at 382-97; Carek, Hendrickson, and Holmes, Delinquency Addiction in Parents, 4 Arch. Gen. Psychiatry, 357-62 (1961); Marrow, Flexibility in Therapeutic Work with Parents and Children, 38 Bulletin of the Menninger Clinic, No. 2, at 129 (March 1974); Kreisman and Jay, Family Response to the Mental Illness of a Relative: A Review of the Literature, 10 Schizophrenia Bull. 34 (1974).

27/ One study reports that, from the parents' standpoint, scapegoating their children is not without utility. "For the parents, scapegoating served as a personality-stabilizing process. While the parents of these children did have serious internal conflicts, the projection of these difficulties onto the children served to minimize and control them. . . . From the point of view of the family, the primary function of scapegoating is that it permits the family to maintain its

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As for parents of mentally retarded youngsters, one commentator has enumerated some of the factors motivating

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27/ (cont.)
solidarity. . . . In all the disturbed families, very serious dissatisfactions between spouses came to light during the course of therapy. . . ." Vogel and Bell, The Emotionally Disturbed Child as the Family Scapegoat, in A Modern Introduction to the Family, 394-95 (N. Bell & E. Vogel eds. 1960).

See Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Cal.L.Rev. 840, 859-62 (1974); T. Scheff, Being Mentally Ill: A Sociological Theory 171 (1966) (noting a Philadelphia study which found that in 25 percent of the complaints of mental illness, it was the complainant, rather than the prospective patient, who showed signs of mental illness); Kaufman, et al., Treatment Implications of a New Classification of Parents of Schizophrenic Children, 116 Am.J.Psychiat. 620 (1960); Stabenau, et al., A Comparative Study of Families of Schizophrenics, Delinquents, and Normals, 28 Psychiatry 45 (1965) ("It has long been recognized that for many troubled parents, the most acceptable way to seek help for themselves is to seek it, instead, for their child. The overt wish to have the child treated masks, in very many cases, the covert wish of parents to have themselves treated. . . ."); Rinsley and Hall, Psychiatric Hospital Treatment of Adolescents, 7 Arch. Gen. Psychiat. 286, 287 (1962).

such parents to seek institutionalization of their children, including the interests of other children in the family, the mental and physical frustrations of the parents, hostility and economic strain resulting from the burden of caring for the children, and the parent's success-oriented expectations for their children. Murdock, Civil Rights of the Mentally Retarded: Some Critical Issues, 48 Notre Dame L. Rev. 133, 139-43 (1972). These considerations dramatize very real problems which confront parents of retarded or severely disturbed youngsters. The legal system, however, should not exalt the parents' difficulties over the children's needs by delegating an essentially unfettered power to parents who are in the midst of emotional turmoil.

The possibility that some parents seek to avoid the responsibility for caring for their children has not escaped judicial recognition. Dissenting in Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968), Mr. Chief Justice (then Circuit Judge) Burger commented,

> Lawmakers in recent years have been sensitive to the need to

> make civil commitment difficult recognizing the danger of relatives 'farming' out their kindred into mental institutions for motives not always worthy. 401 F.2d 416 n.4.

In New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F.Supp. 752, 762 (E.D.N.Y. 1973), the court admonished:

> There may be a fundamental conflict of interest between a parent who is ready to avoid the responsibility of caring for an abnormal child and the best interests of the child. [citation omitted].

And in a similar vein the North Carolina Supreme Court has concluded:

> The parent's admission of a child to a treatment facility may result from a variety of factors, and it is possible that not all of these factors stem from a legitimate concern for the child. [citation omitted]. In re Long, 25 N.C. App. 702, 214 S.E. 2d 626, 629 (1975).

Amicus is not contending that most parents who seek to commit their children are doing so for nefarious or ulterior reasons unrelated to what the parents perceive as the best interests of their children. The fact is, however, as the record below

demonstrates,[28/] some parents do have hidden agendas. Even the most well-intentioned parents may unconsciously attempt to shift the responsibility for their own or shared difficulties upon their children, while other parents may be responding hastily or unwisely to the pressure of familial dysfunction of which they are both a participant and a cause. It is difficult for parents to make rational choices when they feel the pressure of family problems, especially when the decision to place a child in a state mental hospital entails an expertise about the treatment of mental illness, and the existence of less intrusive methods of treatment, which the ordinary parent will usually not possess.

28/ See, e.g., deposition of Dr. Eli Messinger (App. 163-168); Deposition of Dr. John Filley, Director of the Office of Child and Mental Health Services, Atlanta Division ["The problem here in part is the history and tradition of mental hospitals which have been dumping grounds in the past. . . . there are a lot of people who still treat them as dumping grounds." (App. 768); Deposition of Dr. Luciano L'Abate (App. 799-805).

4. Children and Parents Who Disagree as to the Appropriateness of Institutionalization are in a Position of Fundamental Conflict of Interest.

There is, therefore, manifest potential for conflict of interests when parents seek the commitment of their children to mental hospitals. Where such potential conflicts exist, courts have not been reluctant to act in order to safeguard the independent interests of the child.[29/] Due process procedures

29/ See, e.g., McBridge v. Jacobs, 247 F.2d 595 (D.C. Cir. 1957) (parent may not waive minor's right to counsel); Horacek v. Exon, 357 F.Supp. 71 (D. Neb. 1973) (separate guardian ad litem appointed to represent children suing to remedy conditions in state home for retarded); State v. Wade, 527 P.2d 753 (Ore. App. 1974), appeal dismissed, 96 S.Ct. 16 (1975) (because of potential conflict in all parental termination proceedings appointment of separate counsel for children is mandatory); Melville v. Sabbatino, 30 Conn. Supp. 320, 42 U.S.L.W. 2242 (1973) (minors over age of 16 can sign themselves out of mental hospitals even if their parents have admitted them); In re Henry G., 28 Cal.App. 3d 276, 104 Cal.Rptr. 585 (1972) (error to preclude minor's counsel for inquiring into whether alleged breakdown in parental control resulted from mother's failings); In re Smith, 16 Md. App. 209, 295 A.2d

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are the preferred and appropriate mechanism for ensuring that the best interests of the child will be considered independently of his parents' desires. The child's fate should not be clouded by a variety of parental pressures and concerns which, although pertinent to the treatment inquiry, ought not be dispositive. See Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Saville v. Treadway, supra; In re Long, supra.

5. No Uniform Procedure Exists Under Georgia Law Which Provides an Adequate Substitute for a Due Process Hearing.

Unlike many jurisdictions,[30/] Georgia

29/ (cont.) 238 (1972) (minor's mother has no power to compel minor to undergo abortion against her will); In re Anonymous, 42 Misc. 2d 572, 248 N.Y.S. 2d 608 (Nassau Co. Ct. 1964) (adoptive parent's application to commit ten-year-old child to mental hospital denied because minor's hallucinations caused by rejection of adoptive parents); In re Sippy, 97 A.2d 455 (Ct. of App., D.C. 1953) (where interests of mother and minor are sharply opposed regarding commitment of the minor to a "psychiatric school," the mother's attorney cannot purport to represent the minor.)

30/ See Bartley v. Kremens, supra, n.5 1042; In re Roger S., 19 C.3d 655, n.5 666, ___ Cal.Rptr. ___ (1977).

does not require that before a minor may be admitted to a state hospital, he must be evaluated and tested by a community mental health center. The record contains numerous references to the divergent practices among the various regional hospitals in Georgia,[31/] and appellants have been unable to point to any state law or regulations requiring such a procedure of prior screening and evaluation. Although, for reasons to be developed, infra, Amicus has serious doubts about the adequacy of even a mandatory screening program at the community level, it is important to recognize that Georgia

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31/ Deposition of Drs. John J. Gates and W.T. Smith (community mental health program "[t]o some degree" plays a role in the admission policy of Central State Hospital) (App. 280); Deposition of Dr. Wladyslaw Piotr Mazur (If request comes from family, evaluation conducted by staff at West Central Georgia Regional Hospital; patients referred by mental health clinics are screened by clinics and evaluated at hospital.) (App. 479); deposition of Dr. James B. Craig (Emergency cases admitted directly by Regional Hospital in Savannah; non-emergency cases screened by mental health center.) (App. 522-23).

lacks such a uniform procedure which would, at least, tend to increase the number of minors being referred to community mental health programs with which the centers are more familiar than the regional hospitals.

The sole substitute to a due process hearing which is required under Georgia law is the diagnosis and observation of the patient which occurs at the regional hospitals after the minors have been admitted. Ga. Code Ann. §88-503.1. However, the recent literature which Amicus has reviewed raises considerable question as to the ability of psychiatrists, not only to predict dangerousness, but even to agree in their most gross psychiatric diagnoses.[32/]

32/ See Rosenhan, On Being Sane in Insane Places, 13 Santa Clara Law. 379 (1973) (8 sane persons, feigning mental illness, were admitted to mental hospitals and diagnosed as schizophrenic or manic-depressive; when released, none of the persons was considered by the hospital staff to be cured.) Ennis and Litwack have reviewed the pertinent literature exhaustively and conclude that if a psychiatrist testifies that a patient falls into a specific, non-organic diagnostic category, ". . . it is more

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Given the demonstrable unreliability of psychiatric diagnosis, even under optimum conditions, such a relatively crude instrument may not be relied upon as the essential protector of the

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32/ (cont.)
likely than not that a second psychiatrist would disagree." Ennis and Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 702 (1974). In one experiment, twenty-seven experienced psychiatrists, all members of the same hospital, used a standardized set of statements to rate patients presented to them in a half-hour filmed interview. The psychiatrists ". . . were unable to agree as to the patient's diagnosis, prognosis, psychodynamics, the cause of her problems, the feelings she was consciously experiencing or the feelings that were latent . . ." Stoler and Geertsma, The Consistency of Psychiatrists' Clinical Judgments, 137 J. of Nerv. Mental Dis. 58, 64 (1963). In still another study, two skilled psychiatrists diagnosed twenty hospital patients for depression. Both psychiatrists labeled six of the twenty patients as depressed, but they did not choose the same six! Cherry and Cherry, The Common Cold of Mental Ailments: Depression, New York Times Magazine, Nov. 25, 1973 at 38; see Roth, Dayley and Lerner, Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes, 13 Santa Clara Law. 400 (1973).

minor's liberty.

Another major problem is that Ga. Code Ann. §88-503.1 only requires the superintendent of the hospital to find "evidence of mental illness" and that the minor is "suitable for treatment." It would appear that the statute does not even require a finding that the minor suffers from a mental disorder; but even assuming arguendo the statute is construed this narrowly, it fails to distinguish between those persons who would benefit from psychiatric treatment and those who require institutionalization.33/ Placing

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33/ A number of courts have invalidated mental commitment standards which were based upon a determination as to whether a person is in need of care or treatment. These courts have insisted that involuntary confinements to mental institutions be limited to persons who have shown a propensity for harm to themselves or others. Bell v. Wayne County Gen. Hosp. at Eloise, 384 F.Supp. 1085 (E.D. Mich. 1974) (three-judge court) (imminent threat of physical harm to prospective patient or others); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court) (overt act showing real and present threat of substantial harm to prospective patient or others); State ex rel. Hawks v. Lazaro, 202
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only the psychiatrists between the parent and hospitalization of the child, the Georgia scheme does nothing to protect against the unnecessary hospitalization which is certain to occur given the inadequacies of the psychiatric diagnoses referred to above. Moreover, these inadequacies in diagnoses are made more serious by the utter lack of standards under Georgia law to govern placement of minors in mental hospitals. Hence, the Georgia scheme provides only an unsystematic, haphazard, and largely ineffectual check upon parental discretion.

It is also important to recognize the conditions under which psychiatrists in mental hospitals evaluate the children for possible commitment purposes. As Professor Stone has noted,

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33/ (cont.)
S.E. 2d 109, 123 (W. Va. 1974) (self-destructive urge or person will permit himself to die of starvation or lack of care); Commonwealth ex rel. Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764 (1975) (overt act raising substantial likelihood of future dangerous acts); see Humphrey v. Cady, 405 U.S. 504, 509 (1972) (dicta).

> The feeling of crisis which attends the process of emergency confinement rarely permits the full exploration of the patient's competence.
> Stone, Mental Health and Law: A System in Transition 48, National Institute of Mental Health (DHEW Publ. No. (ADM) 75-176, 1975).

Not only are many mental hospitals understaffed[34/] but equally significant, most physicians:

> learn early in their training that it is far more culpable to dismiss a sick patient than to retain a well one.
> Scheff, Being Mentally Ill: A Sociological Theory 110 (1966).

This has led to the conservative bias of almost all psychiatrists in favor of over-diagnosing mental illness,[35/]

34/ Mechanic, Some Factors in Identifying and Defining Mental Illness, 46 Mental Hygiene 66 (1962).

35/ Scheff conducted a study of mental commitments drawn from psychiatrists' ratings of a sample of patients newly admitted to public mental hospitals in a Midwestern state. He found that in two-thirds of the hospitals the examinations were perfunctory and virtually never resulted in findings of health. In some instances the decision to retain a patient was reached even when no evidence of any mental disorder could be found. Scheff, Being Mentally Ill: A Sociological Theory 142, et seq. (1966).
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as contrasted with the criminal law's presumption that defendants are both innocent and sane. It is understandable that a physician trained in treating illness would prefer to commit a healthy person to a mental hospital rather than allowing a mentally ill person to go free, but such a practice is hardly consistent with the constitutional guarantee that liberty shall not be infringed without due process of law.

Finally, given the inherent bias of the psychiatrist in favor of finding illness, and the time and resource

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35/ (cont.)
Mechanic reports that in two mental hospitals studied over a period of three months he ". . . never observed a case where the psychiatrist advised the patient that he did not need treatment. Rather, all persons who appeared at the hospital were absorbed into the patient population regardless of their ability to function adequately outside the hospital." Mechanic, Some Factors in Identifying and Defining Mental Illness, 46 Mental Hygiene 66, 70 (1962). Brown has referred to the practice of large state mental hospitals which admit "everyone sent for hospitalization." E. L. Brown, Newer Dimensions of Patient Care, pt. I, at 60 (1961).

constraints upon the initial evaluation, the fact that a parent has decided that a child is sufficiently mentally ill to warrant his institutionalization is likely to substantially predispose the physician to join in the parent's appraisal.36/ Even a physician who questions the parent's evaluation is likely to approve the commitment in order to provide sufficient time for a thorough examination and diagnosis. Once the child is present in the mental institution, there is considerable evidence that he may adopt the "deviant" behavior of other patients as his own, thus confirming the institution's diagnosis.37/ And even if

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36/ "[W]here the parent admits a child for treatment, the examining doctor may quite naturally identify with the interest of the parent. If [this] happen[s], the doctor would be unable to act effectively as a screening agent at the initial stage of examination." In re Long, 25 N.C. App. 702, 214 S.E. 2d 626, 629 (1975); see Scheff, Being Mentally Ill: A Sociological Theory 149 (1966).

37/ See E. Goffman, Characteristics of Total Institutions, in Symposium on Preventive and Social Psychiatry (1957): H. Dunham and S. Weinberg, The Culture of the State Mental Hospital (1960).

evaluation ultimately results in the minor's discharge, he already will have suffered a considerable deprivation of liberty warranting due process protection. See, e.g., Bell v. Burson, 402 U.S. 535 (1971); Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (9th Cir. 1973).

6. Mature, Competent Adolescents, Who Are Capable of Fully Understanding the Consequences of Their Actions, Should Not Be Disqualified from Participating in the Judicial Process Simply Because They are Minors.

Amicus believes that a final factor which should be accorded substantial weight in any decision affecting vital interests of a child is the child's capacity to arrive at mature, intelligent, and competent decisions about what is in his best interests. Because these considerations are also of crucial importance in determining the extent to which hearings must be afforded minors under an equal protection analysis, Amicus will explore the applicability of these factors separately in Point III, infra.

III. EVEN IF ALL MINORS IN GEORGIA ARE NOT ENTITLED TO FULL DUE PROCESS HEARINGS, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT MINORS AGE FOURTEEN AND OLDER RECEIVE COMMITMENT HEARINGS COMPARABLE TO THOSE AVAILABLE TO ADULTS.

Amicus has previously asserted that all minors are entitled to due process hearings irrespective of age. Even if, arguendo, this Court rejects the views which Amicus has thusfar presented, Amicus strongly believes that Georgia minors who are over the age of thirteen must, both as a matter of sound judicial policy and under an equal protection analysis, be accorded mental commitment hearings comparable to those available to adults.

Legislative distinctions between adults and minors have generally been posited upon the assumption that minors lack the maturity and judgment necessary for making independent decisions. See Carey v. Population Services, supra, n.15 2021; Planned Parenthood, supra, at 102 (Stevens J. conc. and diss.). At the same time, courts have increasingly recognized that, for older minors particularly, "Constitutional

rights do not mature and come into being magically only when one attains the state-defined age of majority." Planned Parenthood, supra, at 2843. Indeed, in Planned Parenthood, this court specifically recognized that any independent interest which a parent may have in terminating his minor daughter's pregnancy must yield to the privacy right of "the competent minor mature enough to become pregnant." [Emphasis supplied.] Id. at 2844.[38]

The ability of older, mature minors to reach reasoned conclusions as to what is in their best interests has been recognized for many years in

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38/ It is possible to attribute the different results reached by this Court in such cases as Carey v. Population Services International, 97 S.Ct. 2010 (1977), and Planned Parenthood, supra, on the one hand, and Ingraham v. Wright, 51 L.Ed. 2d 711 (1977), and Smith v. Organ. of Foster Families for Equality and Reform, 97 S.Ct. 2094 (1977), on the other, in part to differences in the ages of the children affected by this Court's decisions. Children who are capable of conceiving a child constitute a self-limiting class of older minors, whereas school children and foster children include minors of all ages.

jurisdictions which follow the so-called "mature minor rule." The cases which follow this exception to the common law doctrine that parental consent is required for non-emergency medical treatment of minors hold,

> . . . when the minor has sufficient mental capacity and maturity to understand the nature and consequences of the medical procedure or treatment undertaken for his or her benefit, the minor's consent to treatment will be legally sufficient.
> Pilpel and Zuckerman, Abortion and the Rights of Minors, 23 Case West.Res.L.Rev. 779, 783 (1972)[39]

39/ See, e.g., Younts v. St. Francis Hosp. and School of Nursing, Inc., 205 Kan. 292, 301, 469 P.2d 330 (1970); Gulf and S.I.R. Co. v. Sullivan, 155 Miss. 1, 10, 119 So. 501 (1928); Lacey v. Laird, 166 Ohio St. 12, 14, 139 N.E. 2d 25 (1956); Bishop v. Shurly, 237 Mich. 76, 78-79, 211 N.W. 75, 85-86 (1926); Bach v. Long Island Jewish Hosp., 49 Misc. 2d 207, 267 N.Y.S. 2d 289 (Sup. Ct. 1966); see also W. Prosser, Torts, §18 at 103 and n.51 (4th ed. 1971); Restatement of Torts §59(a) (1934); Bennett, Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis, 62 Va.L.Rev. 285 (March 1976); Institute of Judicial Administration-American Bar Ass'n, "Juvenile Justice Standards Project", Standards Relating to Rights of Minors (Tent. Draft 1977) §4.6.

The "mature minor rule" is also consistent with the overwhelming consensus of developmental psychologists that a child of twelve or thirteen years of age has begun to develop significant mental capacity which, by age sixteen, is firmly established.[40/]

Recently, in Bellotti v. Baird, 428 U.S. 132 (1976), this Court remanded a case to afford the Supreme Judicial Court of Massachusetts an

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40/ The person who has pioneered in this area has concluded that qualitative changes in the direction of adult thought begins at age 12-13. J. Piaget, The Moral Judgment of the Child (1932). See Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 Stan.L.Rev. 1383, 1395-97 (1974): "Beginning in early adolescence, the child is able to deal with abstract concepts and ideals such as love, equality, and society [citing J. Hill and J. Shelton, Readings in Adolescent Development and Behavior 84 (1971)], and to anticipate and evaluate future consequences." 26 Stan.L.Rev., supra, 1395 n.66. See Adelson and O'Neil, Growth of Political Ideas in Adolescence: The Sense of Community, 4 J. Pers. and Soc. Psychol. 295 (1966). By age 16 the cognitive transformation is basically completed and adult mental operations are firmly established. See Elkind, Egocentrism in Adolescence, 38 Child Develop. 1025, 1032 (1967).

opportunity to construe its abortion statute in order to determine, inter alia, whether the mature minor rule is applicable. When the Supreme Judicial Court of Massachusetts indicated that the mature minor rule is applicable only to medical procedures other than abortions [Baird v. Attorney General, 360 N.E. 2d 288, 294-96 (1977)], the three-judge court promptly stayed the state court's decision. Baird v. Bellotti, 428 F.Supp. 854 (D.Mass. 1977). The court stated that it would have to determine whether the mature minor rule is a constitutional requirement in order to mollify "otherwise impermissibly harsh effects of [the] statute." Id. at 856-57.

Amicus believes that no "significant", or even rational, state interest is served by Ga. Code Ann. §§88-503.1 and 88-503.3(a) which deny to mature minors, capable of exercising their rights with intelligence and understanding, the same hearing which is available to even incompetent or mentally retarded adults. See Carey v. Population Services International, supra, n.15 2021. Even if, arguendo, Georgia

could summarily commit adults to state mental hospitals, it may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, draw distinctions based solely upon age when age is tenuously related to the determinative factors of maturity, competence, and understanding.[41] Cf. Eisenstadt v. Baird, 405 U.S. 438 (1972). By creating an all-inclusive, irrebutable presumption that minors are incapable of intelligently choosing whether they desire to be hospitalized, the Georgia procedure,

> . . . forecloses the determinative issues of competence and care . . . [and] needlessly risks running roughshod over the important interests of both parent and child. Stanley v. Illinois, 405 U.S. 645, 657 (1972).

In recent years both Congress and state legislatures have increasingly

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41/ It is interesting to note that under the Georgia statutes challenged in this Court even minors who demonstrated the traditional indicia of emancipation, such as marriage, induction into the armed services, or a domicile separate from their parents [see Standards Relating to Rights of Minors, supra, Commentary to §2.1(c), p. 27] are not entitled to any type of precommitment hearing.

recognized that minority is not synonymous with maturity, and that the traditional notion that minors are lacking in legal rights must yield to a more flexible rule which considers, not only the age of the minor, but also the purpose of the legislative enactment. Since the passage of the 26th Amendment, at least thirty-three state legislatures have lowered their age of majority to eighteen. Arnoff, What Lawyers Should Know About the New Age of Majority, 46 Ohio Bar 1551 (Nov. 1973). Almost all jurisdictions have provisions which authorize juvenile courts to transfer minors to criminal courts for adult prosecution. See Breed v. Jones, 421 U.S. 519 (1975); Kent v. United States, 383 U.S. 541 (1966).[42] Many state legislatures have enacted laws enabling minors to consent to medical treatment for various problems, including treatment for drug abuse or dependency. Katz, Schroeder, and Sedman, Emancipating our Children --

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42/ A compilaton of these statutes is contained in Stamm, Transfer of Jurisdiction in Juvenile Courts, 62 Ken. L.J. at 122 at n.6 126 (1973).

Coming of Legal Age in America, 7 Family Law Quarterly 211, 238-39 (Fall 1973); Pilpel, Minors' Right to Medical Care, 36 Albany L. Rev. 462 (1972). Amicus has annexed to this brief as Appendix A a table which sets forth for each state the maximum age of juvenile court jurisdiction, the minimum age for waiver to criminal court, the age of criminal responsibility, the age of majority, the age of eligibility for marriage, and the age at which a child must consent to adoption. This table demonstrates conclusively that each state delegates significant responsibility to minors consistent with their age and the state policy underlying the legislative enactment.

Amicus is not asking this Court to legislate for the entire nation a minimal age at which children are entitled to full due process hearings before they are admitted to state mental hospitals. Amicus does believe, however, that it is both appropriate and necessary for this Court to look to the enactments of state legislatures to determine if those governing bodies have specified sufficient indicia

of competence and responsibility so that a minimal age must be judicially imposed as a matter of equal protection. This approach is consistent with the analysis undertaken recently by Justice Powell in Carey v. Population Services International, supra, where Justice Powell found that since New York had authorized marriage at age fourteen, it is presumed that husbands and wives of that age, ". . . possess the requisite understanding and maturity to make decisions concerning sex and procreation." 97 S.Ct. at 2028.

Amicus believes that for most jurisdictions the significant age to look to is the age of criminal responsibility.[43/] At common law a child fourteen years of age of older was presumed conclusively to have the

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43/ The Commentary to the National Institute of Mental Health's Draft Act Governing Hospitalization of the Mentally Ill (Pub. Health Services Pub. No. 51, 1951) argues that the age at which persons should be able to seek hospitalization on their own initiative or, once hospitalized, request their own release, should be based upon their responsibility for criminal conduct or their legal capacity to consent to surgery.

criminal responsibility of an adult.[44] Children fourteen years of age or older were considered no longer of "tender years" because they had the same capacity as adults to distinguish right from wrong.[45] As noted recently by the California Supreme Court,

> Traditionally, and modernly by statute, minors have been presumed competent to accept responsibility for criminal acts at age 14. [Citations omitted.] It would be anomalous indeed if they were not also presumed to have sufficient capacity to exercise due process rights at that age.
> In re Roger S., 19 C.3d 655, 665-66, ___ Cal.Rptr. ___ (1977).

In Georgia the age of criminal responsibility is thirteen. Ga. Code Ann. §26-701. Under the equal protection analysis undertaken by Amicus, age thirteen presumptively is the age at which minors should be entitled to full pre-commitment due process hearings.

44/ LaFave and Scott, Criminal Law 351-52 (1972); Kean, History of Criminal Responsibility of Children, 53 L.Q. Rev. 364 (1937).

45/ Odgers and Odgers, The Common Law of England, n.1 1369 (2d ed. 1920); 4 Stephen, Commentaries on the Law of England, 24-26 (10th ed. 1886).

However, Amicus also believes that other state statutes relating to rights and responsibilities of minors should be consulted. Under Ga. Code Ann. §88-503.1(b) a superintendent of a state hospital may receive a minor fourteen years of age or older who makes application for admission, subject to the parent or guardian's later application for discharge of the minor. Since the Georgia legislature has determined that minors age fourteen or older possess sufficient mental ability and understanding to seek their own commitments to state mental hospitals, it defies rationality to delegate to the parents or guardians an unfettered power of disaffirmance. Cf. Melville v. Sabbatino, 30 Conn. Supp. 320, 42 U.S.L.W. 2242 (1973) (minors over age sixteen can sign themselves out of mental hospitals even if their parents have admitted them).

A review of other Georgia statutes confirms the proposition that at age fourteen minors in Georgia are vested with extensive rights and responsibilities.[46] Amicus urges this Court,

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46/ (see next page)

if it is unwilling to grant full due process hearings to all minors, to look to the age distinctions which have been created by the Georgia Legislature. A review of these statutes leads to the conclusion that Georgia minors fourteen years of age or older are considered capable of exercising mature judgment, and should be granted the same hearing procedures which Georgia has made generally

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46/ (from previous page) See, e.g., Ga. Code Ann. §§24A-1701 and 81-212 (service in civil and juvenile court proceedings must be made personally upon minors over age of 14); Ga. Code Ann. §24A-2501 (minors 15 or older may be transferred for criminal prosecution; minors 13 or 14 may be waived if they are charged with committing acts for which punishment is loss of life or life imprisonment); Ga. Code Ann. §24A-3503 (children 13 or older may be fingerprinted); Ga. Code Ann. §49-105 (children 14 or older may select own guardian); Ga. Code Ann. §127 (children 14 or older may, in child custody proceeding, select parent with whom children desire to live; this selection controlling unless parent found unfit); Ga. Code Ann. §54-301 (children 14 or older not subject to child labor laws); Ga. Code Ann. §74-104.3 (children of any age may consent to treatment for venereal disease or drug abuse).

available to adults.

CONCLUSION

For the foregoing reasons, Amicus urges that this Court affirm the judgment below; or, alternatively, modify the judgment in accordance with the reasons set forth in Point III of this brief.47/

Dated: San Francisco, California
September 8, 1977

Respectfully submitted,

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47/ Counsel for Amicus wishes to express his appreciation for the assistance of Peter Beckwith, a third year student of Boalt Hall School of Law, in the preparation of this brief.

APPENDIX A

STATE	Maximum Age of Juv. Ct.; Juris., Non-Traffic Crimes	Minimum Age for Waiver to Adult Criminal Court	Age of Criminal Responsibility	Age of Majority	Age of Eligibility for Marriage	Age at and Above Which Child Must Consent to Adoption
ALABAMA	16[1]	14	14	19	19; with PC--17-m, 14-f	No Provision
ALASKA	17	7[2]	14[2]	19	19; with PC & CC-16-m, 14-f	10, WBC
ARIZONA	17	No Min. Age[3]	14	18	18; with PC & CC-16-m & f	12, WBC
ARKANSAS	17	No Min. Age[4]	14	18	18; with PC-17-m, 16-f	14
CALIFORNIA	17	16 (fel.)	14	18	18; with PC & CC-any age	12
COLORADO	17	14 (fel.)	10	18	18; with PC-16; with PC & CC-under 16	12
CONNECTICUT	15	14 (fel.)	16[5]	18	18; with PC-16; with CC-under 16	14
DELAWARE	17	16 (fel.)	16	18	18; with PC-16-f	14, WBC
DISTRICT OF COLUMBIA	17	16[6]	16	18	18; with PC-under 18	14
FLORIDA	17	14[6]	[7]	21	21; with PC-under 21	12

PC - Parental Consent; CC - Court Consent; m,f - male, female; WBC - Consent Waivable by Court.

STATE	Maximum Age of Juv. Ct.'s Juris., Non-Traffic Crimes	Minimum Age for Adult Court Waiver to Criminal	Age of Criminal Responsibility	Age of Majority	Age of Eligibility for Marriage	Age at and Above Which Child Must Consent to Adoption
GEORGIA	16	15 13 - If capitol crime	13	18	18; with PC-16	14
HAWAII	17	16	16[8]	18	18; with PC-16; with PC & CC-15	10, WBC
IDAHO	17	16	14	18	18; with PC-16; with PC & CC-under 15	No provision
ILLINOIS	16	13	13	18	18; with PC-16; with PC & CC-15	14
INDIANA	17	14	14[9]	18	18; with PC-17; 15-17-f (pregnant)	14
IOWA	17	14	14[9]	18 or Marriage	18; with PC-16	14
KANSAS	17	16	16[9]	18	18; with PC-under 18	14
KENTUCKY	17	16 (fel.)	16[10]	18	18; with PC-under 18	12, WBC
LOUISIANA	16	15	10	18	18	No provision

STATE	Maximum Age of Juv. Ct.'s Juris., Non-Traffic Crimes	Minimum Age for Adult Court Waiver to Criminal	Age of Criminal Responsibility	Age of Majority	Age of Eligibility for Marriage	Age at and Above Which Child Must Consent to Adoption
MAINE	17	Any Age	18[11]	18	18; with PC, under 18	14
MARYLAND	17[12]	14[13]	17[11]	18	18; with PC-16, unless pregnant	10
MASSACHUSETTS	16	14	14[10]	18	18; with PC-under 18	12
MICHIGAN	16	15 (fel.)	15[9]	18	18; with PC-16-f	10
MINNESOTA	17	14	14[14]	18	18; with PC-16-f	14
MISSISSIPPI	17	13 (fel.)	13	21[15]	17-m;15-f; PC-if younger	14
MISSOURI	16	14	14[9]	21	18; with PC & CC-15	14
MONTANA	17	16[16]	14	18	18; with PC & CC-16	12
NEBRASKA	17	16[17]	14[2]	19	19	No provision
NEVADA	17	16 (fel.)	14	18	18; with PC-16; PC & CC-under 16	14
NEW HAMPSHIRE	17	Any age (fel.)	14[2]	18	18; with PC-14-m; 13-f	12

STATE	Maximum Age of Juv. Ct., Juris., Non-Traffic Crimes	Minimum Age for Adult Waiver to Criminal Court	Age of Criminal Responsibility	Age of Majority	Age of Eligibility for Marriage	Age at and Above Which Child Must Consent to Adoption
NEW JERSEY	17	16	16	18	18; with PC if under 18	*
NEW MEXICO	17	15 (fel.)	15[10]	18	18; with PC-16; PC & CC-under 16	10, WBC
NEW YORK	15	No provision	16[19]	18	18; with PC-16-m, 14-f	14, WBC
NORTH CAROLINA	15	14 (fel.)	14[10]	18	18; with PC-16	12
NORTH DAKOTA	17	16	16[20]	18	18; with PC-16; PC & CC-under 16	10, WBC
OHIO	17	15	15[20]	18	18; with PC-under 18	12, WBC
OKLAHOMA	17	No age[22]	14[21]	18	18; with PC-under 18	12
OREGON	17	16	14[23]	18 or marriage	18; with PC-under 18	14
PENNSYLVANIA	17	14	14[20]	21	18; with PC-under 18	12
RHODE ISLAND	17	16 (fel.)	16[20]	21	21; with PC-18-m, 16-f	14

STATE	Maximum Age of Juv. Ct., Juris., Non-Traffic Crimes	Minimum Age for Adult Waiver to Criminal Court	Age of Criminal Responsibility	Age of Majority	Age of Eligibility for Marriage	Age at and Above Which Child Must Consent to Adoption
SOUTH CAROLINA	15	No provision	15[24]	21	18; with PC-16-m, 14-f	No provision
SOUTH DAKOTA	17	10[25]	10[25]	18	18; with PC-16	12
TENNESSEE	17	16/ 15 (serious fel.)	16[20]/ 15	18	18; with PC-16	14
TEXAS	16	15	15[26]/ 10	18	18; with PC-16	12, WBC
UTAH	17	14 (fel.)	14[27]	18 or marriage	18; with PC-under 18	12
VERMONT	15	No provision	15[28]	18	18; with PC-16; with PC & CC-under 16	**
VIRGINIA	17	15 (fel.)	15[10]	18	18; with PC-16	14, WBC
WASHINGTON	17	No[29] age	12[29]	18	18; with PC-17	14
WEST VIRGINIA	17	No provision	***	18	18; with PC-16-f	12, WBC
WISCONSIN	17	16	16[21]	18	18; with PC-16	14
WYOMING	17	Any age	7[30]	19	19; with PC-18-m, 16-f; PC & CC-m-under 18, f under 16	14

NOTES TO APPENDIX

1/ To 17 Jan. 1, 1978.

2/ Statutes silent; common law presumed to apply.

3/ Adult criminal court has exclusive original jurisdiction, and usually "suspends" criminal prosecution and remands to juvenile court. May refuse suspension, regardless of age; in light of §13-135 (modeled after Cal.Pen.Code §26) and State v. Taylor, 512 P.2d 590 (1973), 7 and above could be held criminally liable.

4/ All kids waivable, but "No infant under 12 shall be found guilty of any crime" §41-112.

5/ Statute says "child" (defined as one under 16) not to be prosecuted in criminal court. No other mention. Age is 14 if child meets waiver requirements.

6/ Any juvenile, if capital offense or punishable by life.

7/ Common-law presumptions inapplicable. State v. D.H., 340 S.2d 1163 (1976).

8/ Common-law inapplicable; commentary to §704-418.

9/ Statute silent; gives age for waiver and case law holds juvenile adjudication not criminal conviction.

10/ Statute silent; gives age for waiver only.

11/ Statute specifically states age of criminal responsibility to be 18, save when child is waived. Presumably, common limitation (age 7) inapplicable.

12/ Criminal court has original jurisdiction over minors 14 and over charged with offenses punishable by death or life imprisonment.

13/ Can waive minor under 14 if offense punishable by death or life imprisonment.

14/ Criminal responsibility statute amended specifically to conform with waiver age.

15/ 1976 change lets 18-21-year-olds contract re personal property

16/ No waiver; 16 year olds who commit listed violent offenses go automatically to criminal court.

NOTES TO APPENDIX (cont.)

17/ Misdemeanors only; any age for felony, but presumably limited by common-law age of incapacity (7).

18/ Common law limit of 7 would apply.

19/ Statute provides infancy defense below age where juvenile court loses jurisdiction.

20/ Statute silent; gives age for waiver and provides that no child shall be criminally prosecuted unless waiver.

21/ Statute modeled after California Penal Code §26 -- applicable to juvenile court proceedings per case similar to Gladys R.

22/ Limited by codified common law age of incapacity (7).

23/ Criminal responsibility statute on its face applies only to juvenile remanded and tried as adult. Juvenile court proceeding not trial by statute. Age of 14 probably meaningless, as waiver age is 16.

24/ No criminal responsibility statute, no waiver. Common law would presumably apply, providing infancy defense below age 7 -- although by statute, not criminal proceeding.

25/ No criminal responsibility statute; delinquent child defined as "between 10 - 17" -- only "delinquent child" can be transferred for criminal prosecution.

26/ According to commentary, statute purporting to deal with criminal responsibility of infants not meant to provide defense of infancy (per common law), but only to emphasize that juvenile court proceedings not criminal, and child can only be criminally prosecuted after waiver, which requires age 15. However, jurisdictionally, juvenile court has no jurisdiction under age 10.

27/ Statute modelled after California Penal Code §26.

28/ No waiver, statute provides that juvenile court proceedings non-criminal.

NOTES TO APPENDIX (cont.)

29/ Criminal responsibility statute holds children under 8 incapable of criminal responsibility. Presumption of incapacity between 8-12. Presumably, this would apply to waiver proceedings.

30/ Common-law minimum age; statute silent re: criminal responsibility; no statutory provision to the effect that juvenile proceedings not criminal.

* When prospective adoptee is 10 or more, adoption agency must report to court on "understanding and wishes" of child. Not binding and court may waive this requirement.

** Consent of minor only required if he/she is married.

*** Would be 17; no waiver, and statute states juvenile proceedings non-criminal. Exception: capital offense, wherein original jurisdiction is in criminal court. Presumably, infants below 7 would not be liable because of common law -- statutes silent.

STATUTORY AUTHORITIES FOR APPENDIX

ALABAMA CODE: Tit. 1, §3; tit. 13A, §5-101, et seq., tit. 34, §4; tit. 27, §13, §26, et seq.

ALASKA CODE: §§20.15.040, 47.10.060, 47.10, 25.05.181, 25.05.171, 25.20.010.

ARIZONA REVISED STAT. ANN.: §§8-202A, 8-106, 25-102; ARIZ. CONST. Art. 6, §15; State v. Taylor, 109 Ariz. 481, 512 P.2d 590 (1973); McBeth v. Rose, 111 Ariz. 399, 531 P.2d 156 (1975).

ARK. STAT. ANN.: §§41-112, 45-403, 45-420, 55-102, 56-107, 57-103; Dove v. State, 37 Ark. 261.

CAL. W & I CODE: §§602, 707; CAL. CIVIL CODE: §§25, 225, 4101; CAL. PENAL CODE §26; In re Gladys R., 1 C.3d 855 (1970); In re Michael B., 44 C.A. 3d 443 (1975).

COLO REV. STATS.: §§19-1-103, 19-1-104, 18-1-801, 19-4-107, 14-2-106, 14-2-108; People ex rel. Terrell v. District Court, 164 Colo. 437, 435 P.2d 763 (1967).

CONN. GEN. STAT. ANN.: §§17-53,17-60a, 17-60b, 17-72, 45-61; 46-5g, 46-5f, 1-1d, cf. State v. Elbert, 162 A. 769, 115 Conn. 589 (1932).

DEL. CODE ANN.: Tit. 10, §§901, 938, 931; tit. 13, §§907, 123, 901; tit. 1 §701.

D.C. CODE ANN.: §§11-1551, 11-1553, 30-111, 16-304.

FLA. STAT. ANN.: §§39.01, et seq.; 1.01, 62.011, 741.04, 63.081; State v. D.H., 340 So. 2d 1163 (Fla.) 1976.

GA. CODE ANN.: §§24A-401, 24A-301, 24A-2501, 26-701, 74-104, 53-102.

HAW. REV. STAT.: §§577-1, 578-2, 704-418.

IDAHO CODE ANN.: §§16-1501, et seq., 16-1802, 18-216, 32-101.

ILL. ANN. STATS.: tit. 37 §§702-2, 702-7; tit. 38 §6-1; tit. 3 §131; tit. 89 §§3, 3.1, 3.2.

BURNS' IND. STAT. ANN.: §§31-1-1-4, 31-3-1-6, 32-1-13-2, 31-3-1-6, 31-5-7-4.1; Adams v. State, 244 Ind. 460, 193 N.E. 2d 362 (1963).

STATUTORY AUTHORITIES FOR APPENDIX (cont.)

IOWA CODE ANN.: §§599.1, 600.7, 595.2, 232.2, 232.72; State v. White, 223 N.W. 2d 173 (1974).

KAN. STAT. ANN.: §§23-106, 38-801, 38-101, 38-802, 38-808, 59-2101.

KY. REV. STAT.: §208.020, 208.170, 199.500, 405.010, 405.020.

LA. REV. STAT.: §§14:13, 13:1571.1, 13:1569, 13:1570; LA. CIVIL CODE Art. 37.

MAINE REV. STAT. ANN.: tit. 15 §§2552, 2611; tit. 19 §§4, 62, 532; tit. 17-A §53.

ANN. CODE MD.: "Courts and Judicial Process" [special title] §§3-801, 3-808, 3-809, 3-816; Code proper, Art. 1, §24; Art. 62 §9; Art. 16 §74.

MASS. GEN. LAWS ANN.: Ch. 119 §§52, 61; ch. 4 §7; ch. 210 §2; ch. 207 §§7, 9.

MICH. COMP. LAWS ANN.: §§712A.1, 712A.2, 712A.4, 710.43, 10.22, 551.103.

MINN. STATS. ANN.: §§260.111, 260.015, 260.125, 259.24; cf. State v. Olson, 156 M. 181, 194 N.W. 942 (1923).

MISS. CODE ANN.: §§43-21-5, 43-21-7, 43-21-31, 43-21-35, 93-1-5, 93-17-5, 93-19-1, 93-19-13.

VERNON'S ANN. MO. STATS.: §§211.021, 211.071, 211.011, 453.030, 475.010, 475.055; State v. Harold, 364 Mo. 1052, 271 S.W. 2d 527 (1954), appeal transferred 281 S.W. 2d 605.

REV. CODES MONT.: §§10-602, 94-201, 48-306, 48-308, 61-207, 64-101.

REV. STATS. NEB.: §§43-202, 43-202.01, 42-105, 43-104, 38-101.

NEV. REV. STATS.: §§194.010, 62.010, 129.010, 62.080, 127.020.

N.H. REV. STATS. ANN.: §§170-B:5, 457:5, 457:4, 21:44, 21-B:1, 169:2, 169:21.

N.J. STATS. ANN.: §§9:17B-3, 2A:4-43, 2A:85-4.

N.M. STATS. ANN.: §§13-14-3, 13-13-1, 13-14-28, 40A-1-3, 22-2-25.

STATUTORY AUTHORITIES FOR APPENDIX (cont.)

N.Y. FAM. CT. ACT: §712; N.Y. PENAL LAW: §30.00; N.Y. DOMESTIC RELATIONS LAW §§2, 15, 15-a, 111.

GEN. STAT. N.C.: §§48-10, 48A-1, 48A-2, 51-2, 7A-278, 7A-280.

N.D. CENT. CODE: §§14-10-01, 14-15-05, 14-03-02, 27-20-02, 27-20-34, 12.1-04-01.

OHIO REV. CODE ANN.: §§3109.01, 3101.01, 3107.07, 2151.011, 2151.02, 2151.26.

OKLA. STATS. ANN.: tit. 10 §§1101, 1112, 92, 60.11; tit. 15 §13; tit. 43 §5; tit. 21 §152; Shaffer v. Green, 496 P.2d 375 (Okl Cr. 1972).

ORE. REV. STATS.: §§106.060, 109.328, 109.510, 109.520, 161.380, 419.533, 419.543, 419.476.

PURDON'S PENN. STATS. ANN.: tit. 1 §411; tit. 11 §§50-102, 50-324, 50-325; tit. 48 §1-5; PURDON'S PENN. CON. STATS. ANN.: tit. 1 §199[illegible]

R.I. GEN. LAWS: §§9-1-19, 15-2-11, 15-7-5, 14-1-3, 14-1-7, 14-1-40.

S.C. CODE OF LAWS: §§20-24, 20-24.1, 10-2587.2, et seq., 15-1103.

S.D. CODE LAWS: §§26-8-1, 26-11-4, 26-8-22.7, 26-8-7, 26-1-1, 25-6-5.

TENN. CODE ANN.: §§1-305, 1-313, 1-314, 1-315, 37-202, 37-233, 37-234, 36-115, 36-408.

VERNON'S ANN. TEX. STATS., PROBATE CODE, §3; VERNON'S TEX. CODES ANN., PENAL CODE, §8.07; VERNON'S TEX. CODES ANN., FAMILY CODE, §§1.51, 16.05, 51.02, 54.02.

UTAH CODE ANN.: §§15-2-1, 76-1-41, 78-3a-2, 78-3a-25, 78-30-6, 30-1-9.

VT. STAT. ANN.: tit. 1 §173; tit. 15 §435; tit. 18 §5142; tit. 33 §§632, 662.

VA. CODE ANN.: §§1-13.42; 16.1-228, -241, -269; 20-45-1, -48; 63.1-225.

REV. CODE WASH. ANN. §§13.04.010, 13.04.120, 9A.04.050, 26.04.010, 26.04.210, 26.28.010, 26.32.030.

W. VA. CODE: §§48-4-1, 48-1-1, 48-1-8, 2-2-10, 49-1-4, 49-5-3, 49-7-3

STATUTORY AUTHORITIES FOR APPENDIX (cont.)

WISC. STAT. ANN.: §§48.02, 48.12, 48.18, 48.84, 245.02.

WYO. STATS.: §§8-18.1, 14-115.2, 14-115.38, 1-710.4, 20-2.1, 20-3.